IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

Nos. 98 and 99

ODD FELLOWS OAKRIDGE CEMETERY ASSOCIATION; PALM—I WILL LODGE NO. 58; PIPEFITTERS ASSOCIATION LOCAL UNION 597—U. A.; VERNA UPELL ALBRIGHT; STANLEY C. BATTY and KRISTINE BATTY, his wife; WALTER BATTY; CLARENCE H. BELLMAN; ANNA B. BOLTON and JANE E. PRINZ, sisters; HUGH F. BRENNAN and CARRIE HESER BRENNAN, his wife; HAZEL M. BRIER; MATTHEW BURG; JENNIE CLINE; JACOB A. COOK and FLORA A. COOK, his wife; RUTH EDITH CRAMER; MARY E. CROSS; DU ROY B. DENNHARDT and ANN E. DENNHARDT, his wife; LOLA MAY DEUBEN; MINNIE DRINHAUS; DOROTHEA A. DUNNE; ROBERT H. EHLERS and EDITH A. EHLERS, his wife; EDITH FISCHER; FRANK J. FOLZ and DORA N. FOLZ, his wife; FLORENCE ANDREN FREED; ARLINE GARBER and PHYLLIS KRAMER, sisters; ANNA M. GEISSLER and ERNEST GEISSLER, her son; ROSEL GOLDSCHMIDT; EMILY CRAMER GROSSMAN; JULIUS E. HAEMMERLE and MARGUERITE H. HAEMMERLE, his wife; MARGARET HALLEMAN; MAMIE HAND; ARTHUR L. HENRIKSON and BEATRICE HENRIKSON, his wife; MILDRED HERMAN; ETHEL M. HILL; MARY ASHER HOOVER; WILLIAM J. HOSKINS; ESTELLA A. HURD; HARRIET E. JENKINS; CHRISTINE JURS; REUBEN C. KELBLE; JULIA KLEINSCHMIDT; EDWARD A. KOLSTEDT and ESTHER M. KOLSTEDT, his wife; IDA M. KUEHNLE; ELMER P. LADENDORF and EMMA M. LADENDORF, his wife; LOUISE LITTLE; LUCILLE L. LORENCE; GERTRUDE E. MAHNKE; EDWARD H. MENKE; JULIA T. MICHEL; WILLIAM J. MUNRO and HAZEL MUNRO, his wife; FRED MURPHY and ALMA MURPHY, his wife; MABEL L. NELSON; MAY NEU; SAMUEL F. NORMAN, individually and as Conservator of the Estate and Person of Ralph Reynolds, Incompetent; NICHOLAS OEHMEN and ALICE V. OEHMEN, his wife; EARL J. OVERTON and LUELLA A. OVERTON, his wife; WILLIAM A. PASSOW; MABEL E. PRESSLER; IRMA H. RADTKE; MATTIE SPIECE RAY; LAWRENCE RECKNER, PAUL E. RECKNER and PEARL M. RECKNER, his wife; LINCOLN RODMAN and HAZEL RODMAN, his wife; WILLIAM A. SCHALK; JOHN W. SCHIRMER and ELSIE M. SCHIRMER, his wife; BERTHA M. SMILIE; CLIFFORD P. SMITH and HARRIET E. SMITH, his wife; MILDRED E. SMITH; SHARON SNOW; JAMES STEWART and INA M. STEWART, his wife; EVA L. STUBBE; MARIE C. SURPLUS; ELSIE SWATEK; LAWRENCE J. TAMM and BESSIE M. TAMM, his wife; LOUISE R. TAMM; MAUD THORNTON; JULIA C. WEIGERT; EDWARD WHITE; RUDOLPH C. WILLIAMS and FLORENCE E. WILLIAMS, his wife; ADELINE G. VERBURG; ELAINE WANG; HARRY E. WRIGHT and ANNIE I. M. WRIGHT, his wife; and GEORGE ZILBERMAN and BESSIE ZILBERMAN, his wife,

Appellants,

vs.

OAKRIDGE CEMETERY CORPORATION, VILLAGE OF WESTCHESTER and JOHN NUVEEN & CO.,

Appellees.

APPEALS FROM THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND SUPREME COURT OF ILLINOIS.

MOTION OF APPELLEES, OAKRIDGE CEMETERY CORPORATION AND VILLAGE OF WESTCHESTER TO DISMISS THE APPEALS FOR WANT OF JURISDICTION, AND BRIEF IN SUPPORT THEREOF.

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APPEALS FROM THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND SUPREME COURT OF ILLINOIS.

MOTION OF APPELLEES, OAKRIDGE CEMETERY CORPORATION AND VILLAGE OF WESTCHESTER, TO DISMISS THE APPEALS FOR WANT OF JURISDICTION.

Pursuant to subparagraph (b) of Paragraph 1 of Rule 16 of this Court, Appellees, Oakridge Cemetery Corporation and Village of Westchester, move to dismiss these appeals on the following grounds:

1. The appeals do not present a substantial federal question;

2. The federal question sought to be reviewed was not timely or properly raised, and was not expressly passed upon by the Appellate Court of Illinois for the First District, or by the Supreme Court of Illinois, from which courts the appeals are taken; and

3. The judgment of the Illinois Court appealed from rests on an adequate non-federal basis.

BRIEF IN SUPPORT OF THE FOREGOING MOTION TO DISMISS.

PRELIMINARY STATEMENT.

The Judgment Appealed From.

The appeals in this case are directed both to the Appellate Court of Illinois for the First District (*i. e.*, for Cook County) and to the Supreme Court of Illinois.

The judgment appealed from is the judgment of the Appellate Court, set forth at pages 3 to 10 of the Appendix to Appellants' Jurisdictional Statement. The Supreme Court of Illinois denied Appellants' petition for leave to appeal to that Court from the Appellate Court's judgment, thus making the Appellate Court's judgment final. It is, therefore, the judgment of the Appellate Court which is sought to be reviewed and reversed by the appeal in this case.

The judgment of the Appellate Court thus appealed from, affirmed a decree of the trial court, dismissing for want of equity a suit filed by certain of the Appellants as lot owners in Oakridge Cemetery, seeking:

1. To enjoin and set aside as *ultra vires* a sale by Oakridge Cemetery Corporation to the Village of Westchester of a 100 foot square (approximately 1 acre) parcel of land (herein referred to as "the standpipe site") located in an area never laid out or used for burial purposes; or

2. In the alternative, to enjoin the construction by the Village of Westchester on the standpipe site (the 1-acre parcel conveyed) of a water storage tank or standpipe, because (as the complaint alleges, and Appellees deny) the erection of the standpipe would be unlawful and a violation of the Cook County Zoning Ordinance.

THE ISSUES INVOLVED IN THE STATE COURT PROCEEDINGS.

As stated by the Appellate Court in its opinion (p. 4, Appendix to Appellants' Jurisdictional Statement), the controlling questions in the case, as presented to that Court, were:

> 1. Can Oakridge Cemetery Corporation legally convey "the subject site," *i. e.*, the standpipe site, to the Village of Westchester?—and
>
> 2. Is the erection of a standpipe and pumphouse on the standpipe site permissible under the Zoning Ordinance of Cook County?

There is no other issue in the case. No federal question was involved and none was referred to or decided by the Appellate Court. The decision rested wholly on the interpretation of the state law.

Of the two issues listed, only one, the question of the power of the Cemetery Corporation to convey the standpipe site to the Village of Westchester for the purpose of erecting a standpipe thereon, needs any discussion here.

Obviously, the issue as to the alleged violation of the County Zoning Ordinance is purely local and could involve no federal question.

ARGUMENT.

I.

OAKRIDGE CEMETERY CORPORATION IS A BUSINESS CORPORATION WITH POWER TO DISPOSE OF ANY PARCEL OF LAND NOT NEEDED OR USED FOR CEMETERY PURPOSES.

Oakridge Cemetery is located on a 118-acre tract of land owned by Oakridge Cemetery Corporation, which operates the cemetery. Oakridge Cemetery Corporation—like its predecessors in the ownership and operation of the cemetery—is a business corporation organized in 1917 for profit, under the general corporation law of Illinois (2 Abst. 112, 114).

The statute under which Oakridge Cemetery Corporation was incorporated expressly authorizes organization of a business corporation for the purpose of buying and selling land for burial purposes, and expressly provides that corporations organized under that law may acquire so much land as is "necessary for the transaction of their business," and "may sell and dispose of the same where not required for the uses of the corporation."

> Sec. 1, 5, Corporation Act of 1872, as amended in 1879; Ch. 32, Hurd's Ill. Stats. 1915-6, Pars. 1-5.

As in other business corporations, control of the business and property of Oakridge Cemetery Corporation is vested by law in its Board of Directors and stockholders.

> Section 6 of the Business Corporation Act of 1872, Ch. 32, Hurd's Ill. Stats. 1915-6; Par. 6.

Under the business corporation law, Oakridge Cem-

etery Corporation, by act of its Directors, could therefore dispose of all property of the Corporation which was not used or needed for burial purposes.

Appellants contended that the power conferred on corporations generally by the Act of 1879 to dispose of property not needed for corporate purposes, was restricted by a later Illinois statute, so that it no longer extended to corporations organized for conducting cemeteries.

The Illinois Court did not sustain that contention (pp. 4-6, Appendix to Appellants' Jurisdictional Statement). That interpretation of the Illinois law is not subject to review by a federal court.

As the Appellate Court said (p. 7, Appendix to Appellants' Jurisdictional Statement):

> "The duty to dispose of unneeded land has not been changed by the General Corporation Act of 1919 or the Business Corporation Act of 1933, except as to corporations formed under the latter act with power to deal in real estate without limitation. * * * No stockholder of the cemetery objects to the conveyance to Westchester. The sale was properly authorized by the directors and stockholders, and their action is a determination by them that the subject site is unneeded land. The evidence amply supports defendants' contention that the disposal of the subject site will not interfere with the operation and maintenance of the cemetery, impair the integrity of the cemetery as a burial place, or deprive lot and grave owners of reasonable access to their lots and graves."

The power of Oakridge Cemetery Corporation under the state law to dispose of land not needed or used, and the fact that such power was properly exercised by the corporate authorities, were thus established.

II.

THERE IS NO RESTRICTIVE COVENANT LIMITING THE USE OR THE RIGHT OF THE CEMETERY CORPORATION TO DISPOSE OF ANY OF ITS PROPERTY, OR IMPOSING A TRUST THEREON.

The deeds in the chain of title to the property of Oakridge Cemetery Corporation are listed in the Stipulation of facts. They contain no provision specifying any purpose for which the land conveyed is to be used, or limiting the right of the Cemetery Corporation as owner to dispose of that land (Pars. 33-37, Stipulation of Facts, 2 Abst. 21-2).

III.

THE STANDPIPE SITE IS LOCATED IN A PART OF THE CEMETERY CORPORATION'S PROPERTY NEVER LAID OUT OR USED FOR BURIAL PURPOSES.

The 1-acre parcel of land conveyed by Oakridge Cemetery Corporation to the Village of Westchester, and herein called the standpipe site, is located in an area (referred to in the evidence as "the utility tract") in the southeastern part of the 118-acre property belonging to Oakridge Cemetery Corporation. The utility tract comprises an area of about 9 acres. [illegible]s never been platted or used for burial purposes ([illegible] 372, 405; Par. 5, Stipulation of Facts, 2 Abst. 1[illegible] perintendent of the cemetery testified, the u[illegible]s never used for burial purposes because [illegible]eeded (1 Abst. 375).

Following t[illegible] two aerial photographs of the southeast par[illegible] Cemetery Corporation's prop-

erty, including the utility tract, the location of the standpipe site thereon, and the boundary of the burial grounds. As shown in the photographs, the burial grounds are well wooded, but the trees stop at the edge of the burial grounds. The utility tract is barren of trees and shrubs. Water mains, serving the burial grounds, stop at the edge of the utility tract (1 Abst. 223-224). There is a road and a single strand wire fence extending along the boundary of the burial grounds, separating the burial grounds from the utility tract (1 Abst. 292).

In the years 1913-1934, the utility tract was used, in large part, as farm land for the growing of corn, wheat, other grains, and vegetables (1 Abst. 372). Since 1934, and before that date, as to part of the utility tract, the utility tract has been used for compost piles, the storing of black dirt and plant refuse, and as a sod nursery. It has always been referred to as the "dumping ground" (1 Abst. 372-373, 442-444).

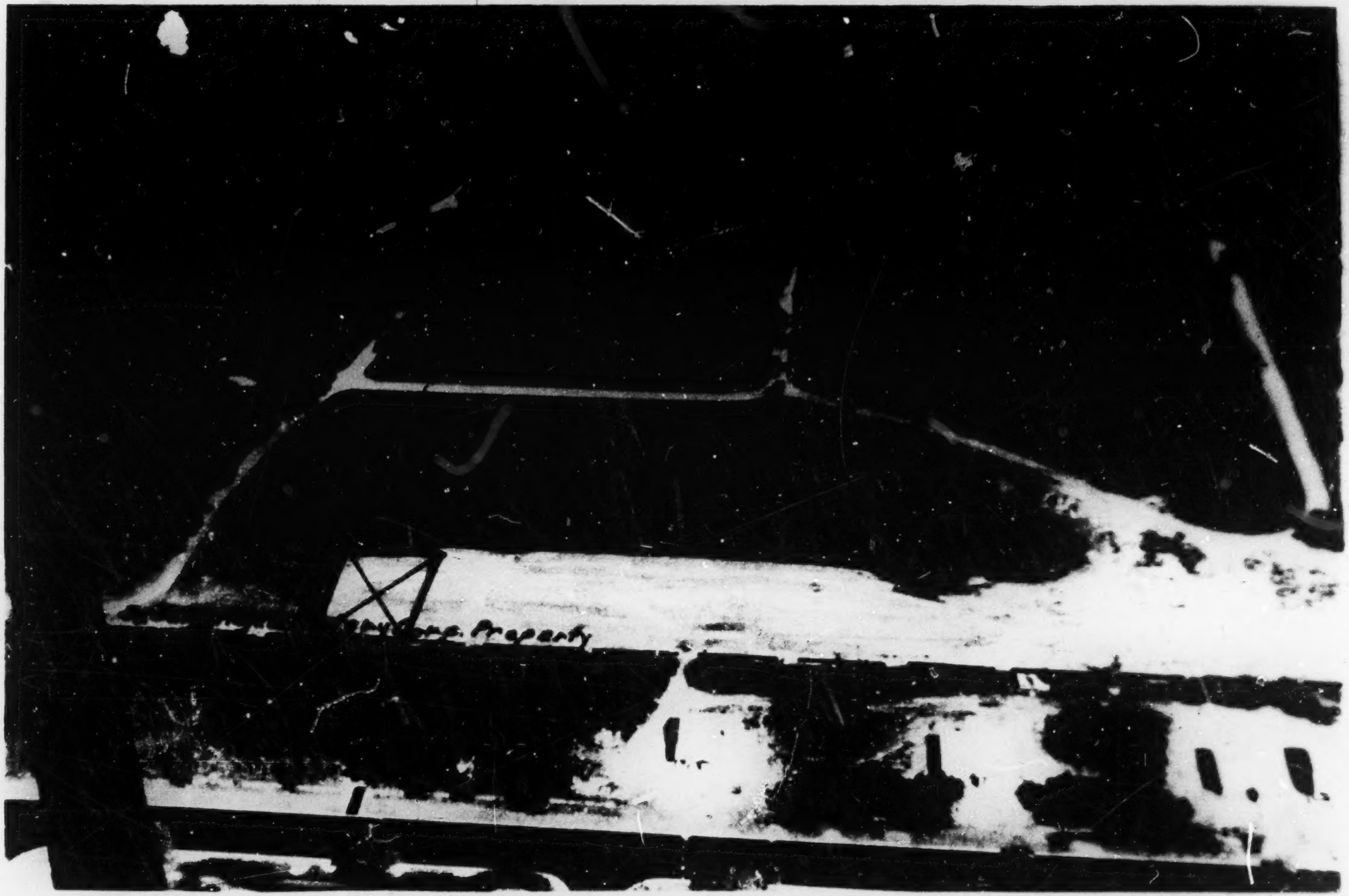
IV.

APPELLANTS HAVE NO PROPERTY INTEREST IN THE UTILITY TRACT AND HAVE NO CONSTITUTIONAL RIGHTS THAT ARE INVADED BY THE SALE OF THE STANDPIPE SITE LOCATED THEREIN.

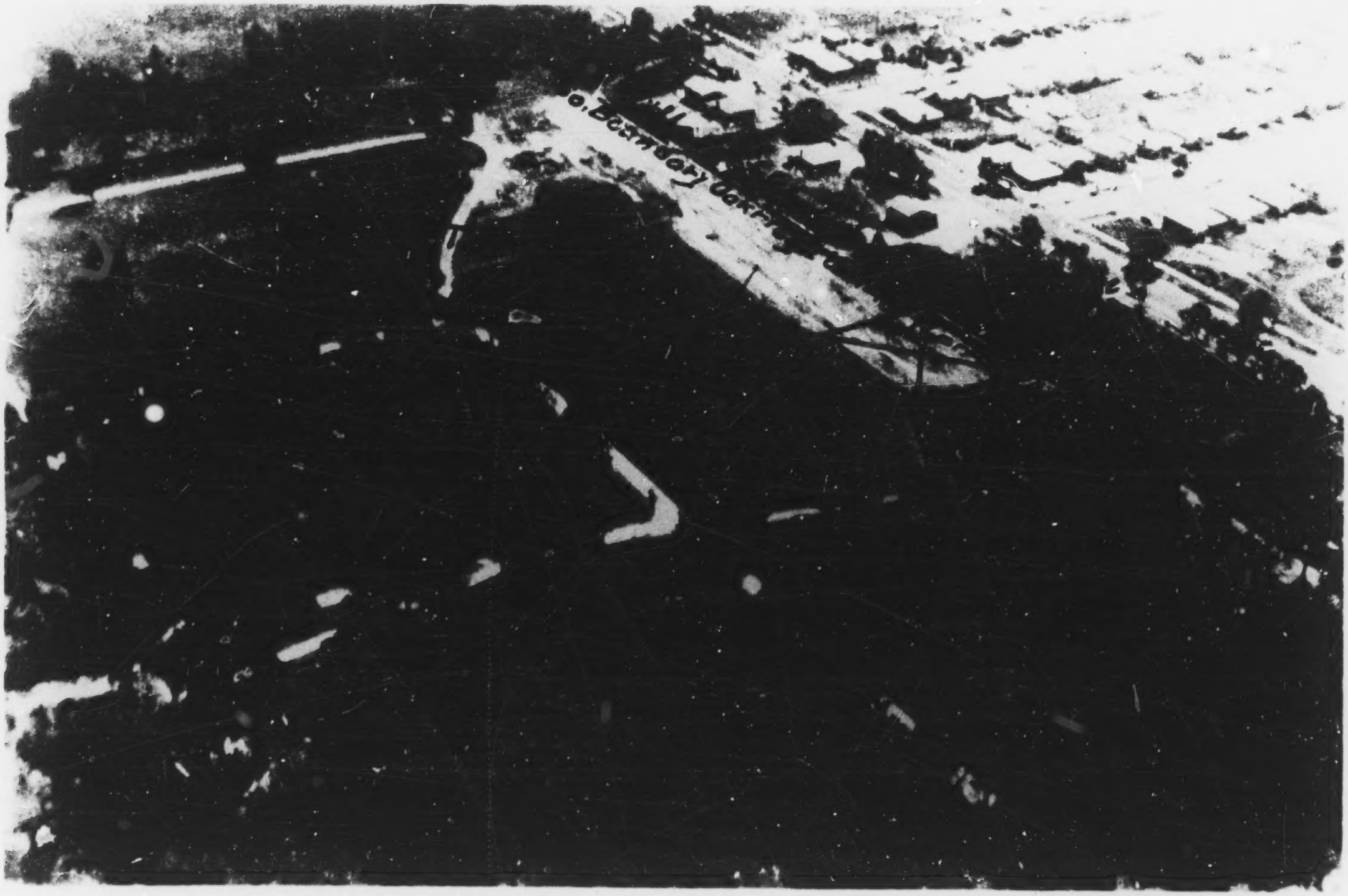
A.

Oakridge Cemetery Corporation Has Unrestricted Power to Dispose of Land Not Laid Out or Used for Burial Purposes.

Where a cemetery corporation, organized under the general law, has land upon which no trust has been imposed either by deed or use, the cemetery corporation has unrestricted power to dispose of the land.



AERIAL PHOTO—SEPT. 18, 1955 (Defts' Ex. B-1, 2 Abst. 2) (Looking North) INCORPORATING INFORMATION FROM PLAT (Defts' Ex. A, Ex. 4 to Answer, 2 Abst. 9).



AERIAL PHOTO—SEPT. 18, 1955 (Defts' Ex. B-2, 2 Abst. 3) (Looking Southeast) INCORPORATING INFORMATION FROM PLAT (Defts' Ex. A, Ex. 4 to Answer, 2 Abst. 9).

Thus, in *Concordia Cemetery Association* v. *Minnesota & N. W. R. Co.*, 121 Ill. 199 (210-211), in holding that land owned by a cemetery corporation but not used for burial purposes, was subject to sale in the same manner as unneeded land held by any other corporation, the Court said:

> "But, manifestly, a deed of land to a corporation empowered to buy and sell land for burial purposes, is not, *ipso facto*, a deed creating a cemetery and prescribing its boundaries. Such a corporation has a discretion when to lay out its grounds for cemetery purposes, as well as how, and until its lands are laid out and opened to the public as a cemetery, they are, simply, lands belonging to a cemetery corporation. Such corporations, in order to get the requisite lands, may, unavoidably, be compelled to buy some other lands not adapted to cemetery purposes, and when they do so, such lands may be sold by the corporation without even becoming a part of any cemetery. * * * Lands not devoted to burial purposes would not become a part of the cemetery by merely being within the same enclosure. * * * That the ground taken by appellee has never been used for burial purposes is proved beyond doubt."

The Concordia Cemetery Association was incorporated under the General Law of 1872, and was empowered by Sections 5 and 6 to sell its land by act of its Board of Directors. The Court, in discussing the means of selling the land, said, by way of dictum, at page 211, that the land could be sold "under the provisions of the Act approved May 15, 1875." That reference was an error. The Act of 1875 referred to (Ch. 21, Ill. R. S. Par. 7, *et seq.*) applies to then existing "cemetery associations" in counties of less than 100,000 inhabitants (not including Cook County, where Concordia Cemetery Association was situated). The "associations" referred to are those organized under the then existing law, operated not for profit by the lot owners. The reference in the Court's opinion to the 1875 Act was

a clear error, but that error had nothing to do with the decision of the case and does not detract from the controlling effect of that decision.

And in *McDonald* v. *Monongahela Cemetery Co.*, 226 Pa. 77; 75 Atl. 38 (39), in sustaining the right of a private cemetery corporation to sell land not used for burial purposes, the Court said (75 Atl. at p. 39):

> "The defendant claims that the cemetery company is a quasi public corporation, and that when it has once purchased a tract of land, and opened it for cemetery purposes, it is incapable of selling any part of it except for burial purposes. This we do not understand to be the law. There seems to be no reason why a cemetery company may not sell its land as well as any other corporation, provided it does not infringe upon the rights of the grantees of burial privileges. There seems to be no reason why it may not sell parts of its land not used for burial purposes, so long as the sale proposed does not deprive the lot holders of the use of and reasonable access to their lots or interfere with the integrity of the cemetery as a burial place."

In a Michigan case, the same rule of law was thus expressed:

> "'A cemetery corporation may sell such portion of its lands as are not used for burial purposes so long as lot owners are not deprived of the use of, or access to, their lots and the integrity of the cemetery is not interfered with'."

Huse v. *Snodgrass*, 330 Mich. 465; 47 N. W. (2) 696 (698).

And to the same effect, see:

City of Tacoma v. *Tacoma Cemetery*, 28 Wash. 238; 68 Pac. 723 (725).

In re Laurel Hill Cemetery Association, 73 Calif. Appellate 193; 238 Pac. 732 (732-4).

The evidence does not warrant a finding that the proposed standpipe would be unsightly. The Master found as a fact that its construction would not depreciate the value of cemetery lots in the neighboring burial grounds (1 Abst. 130-1, 151).

But, in any event, the fact that unneeded and unused land to be sold by a cemetery corporation may be used for unsightly purposes confers no right on the owner of a cemetery lot in the adjacent burial grounds to prevent the sale. As said in the last-cited California case, *In re Laurel Hill Cemetery*, 238 Pac. at page 734:

> "It is argued that, if such lands as those described in the complaint are sold, they may be used for unsightly purposes. That is true, but there is not a word in the statute to the effect that the [cemetery] association ever undertook the burden of controlling either the use of, or the future improvements on, properties adjacent to the cemeteries, whether such adjacent properties were once owned by the cemetery or otherwise."

There is no point in commenting on the cases cited in the Jurisdictional Statement involving land where a trust has been imposed for burial purposes, or belonging to public cemetery associations organized under laws that give the lot owners control of the cemetery. The cases referred to have no application in the case at bar.

B.

The Fact (If It Were a Fact) That Construction of the Proposed Standpipe Might Affect Adversely the Value of Appellants' Burial Lots Gives Them No Property Interest in the Standpipe Site That a Federal Court May Interpose to Protect.

Appellants have no property right of any kind in the standpipe site, or in the utility tract in which it is located.

If we assume (contrary to the fact, as found by the Court below) that the market value of a burial lot might be depreciated by the construction of a standpipe on the standpipe site, that fact would not confer on the owner of a burial lot a property right in the standpipe site, or a right to interfere with its sale or use.

Even if the construction of a standpipe could be deemed to be a nuisance *per se*, that would not confer jurisdiction on a federal court to abate the nuisance at the suit of a lot owner. The existence of a nuisance would not constitute an unconstitutional invasion of the lot owner's property rights.

But, in any event, there is no ground upon which to base a contention that construction of a standpipe on the standpipe site would constitute a nuisance.

To constitute an actionable nuisance, an injury or annoyance must have a tangible and substantial character, physically disturbing comfort and impairing enjoyment of property—such as emission of unreasonable noise, noxious odors, or flooding, etc.

A standpipe is a lawful use of property. It is not a nuisance and its construction could not be enjoined at suit

of a neighboring property owner, even if it adversely affects the value of the plaintiff's property.

> "• • • a use of property which does not create a nuisance cannot be enjoined or a lawful structure abated merely because it renders neighboring property less valuable."
>
> 66 C. J. S. 771; Nuisances, Section 196.

And to the same effect, see:

City of Northfield v. *Board of Chosen Freeholders*, 85 N. J. Equity 47; 95 Atl. 745 (747).

Pearson & Son v. *Bonnie*, 209 Ky. 307; 272 S. W. 375; 43 ALR 1166 (1169).

As said in the last-cited Kentucky case (43 ALR, at p. 1169):

> "If the injury complained of • • • be merely a sentimental one, though it be accompanied by a depreciation in the market value of the property occupied, there is no nuisance in the legal sense."

And, in *Flood* v. *Consumers Co.*, 105 Ill. App. 559 (562), it was held that the Court would not enjoin the construction of an icehouse in a residential neighborhood.

Appellants argue, in their Jurisdictional Statement (pp. 16, 56) that a past application by Oakridge Cemetery Corporation for tax exemption on all property owned by it estops the Cemetery Corporation from claiming that the utility tract was not used for burial purposes. There is no substance to that argument, in view of the undisputed showing that the the utility tract is not and has never been so used. No inconsistency in prior statements by Oakridge Cemetery Corporation's officers would alter the fact as it exists, or would bind the Village of Westchester or impair its title to the standpipe site.

In the 1922 case, mentioned by the Appellants (Jurisdic-

tional Statement, p. 16), the Supreme Court of Illinois, denied Oakridge Cemetery Corporation's petition for exemption from the state capital stock tax, and further stated in its opinion, that the tax assessor had erred in exempting from real estate taxes, those parts of the Cemetery Corporation's property that were not, in fact, used for burial purposes.

As to this, the Illinois Supreme Court said:

> "The only property of appellant that was exempt from taxation, as already shown, is such land as it used exclusively for cemetery purposes or for grounds for burial of the dead. All of its other property was subject to taxation. * * *
>
> It does clearly appear that no land of appellant was taxed by the local assessor or board of review, and it is probable that appellant had land that was exempt from taxation and also that a part of its land was subject to taxation and should have been assessed by the local assessor."
>
> *Oakridge Cemetery Corporation* v. *Tax Commission*, 299 Ill. 432 (434, 436).

V.

IT FOLLOWS THAT THE JUDGMENT APPEALED FROM DID NOT REST ON THE DECISION OF A FEDERAL QUESTION, AND THIS COURT HAS NO JURISDICTION TO REVIEW THAT JUDGMENT; THE APPEALS SHOULD THEREFORE BE DISMISSED.

The judgment of the Illinois Appellate Court, here sought to be reviewed, rested on state and local grounds, amply sufficient to sustain the judgment. No substantial federal question was presented, nor was the decision of any federal question necessary to the decision of the case. The Supreme

Court of the United States, therefore, has no jurisdiction to review the State Court's judgment.

Southwest Bell Tel. Co. v. *Oklahoma*, 303 U. S. 206 (212-213).

Palmer Oil Corp. v. *Amerada Corp.*, 343 U. S. 390.

We submit that the appeals should be dismissed.

Respectfully submitted,

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